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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DANIEL DOMINGUEZ ALANIZ, JR.,<br><br>Defendant and Appellant. | F076254<br><br>(Super. Ct. No. 16CMS3673)<br><br>**OPINION** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Matthew J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Franson, J. and Meehan, J.

A jury convicted appellant Daniel Dominguez Alaniz, Jr., of resisting an executive officer by force (Pen. Code, § 69/count 1),[1] battery with injury on a peace officer (§ 243, subd. (c)(2))/count 2), resisting arrest (§ 148, subd. (a)(1))/count 3) and possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)/count 4), a misdemeanor. In a separate proceeding, Alaniz admitted a prison term enhancement (§ 667.5, subd. (b)) and allegations that he had three prior convictions within the meaning of the "Three Strikes" law (§ 667, subd. (a)).

On July 14, 2017, the court sentenced Alaniz to an aggregate term of six years four months: a doubled middle term of four years on his resisting an executive officer by force conviction, a consecutive, doubled 16-month term on his battery with injury on a peace officer conviction, concurrent terms of 364 days on his convictions for resisting arrest and possession of drug paraphernalia, and a one-year prior prison term enhancement.

On appeal, Alaniz contends: (1) the term imposed on count 2 must be stayed pursuant to section 654; (2) the evidence is insufficient to sustain his conviction in count 2; (3) his conviction in count 3 must be reversed because resisting arrest is a lesser included offense of the offenses he was convicted of in counts 1 and 2; and (4) remand is required to allow the trial court to clarify its calculation of presentence custody credit. We find merit or partial merit to contentions 1, 3 and 4, modify the judgment accordingly, and remand for resentencing. In all other respects, we affirm.

## FACTS

Hanford Police Officer Jonathan Farr testified that on December 12, 2016, at 1:25 p.m., he was dispatched to a call of a long-haired male swinging a pole, causing a disturbance. Farr saw Alaniz, who matched the description of the suspect, and activated

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

his overhead emergency lights. He exited his patrol car and, when he was approximately three feet from Alaniz, ordered him to stop. Alaniz looked at Farr and began to run. Farr caught up to Alaniz, grabbed his right arm, and spun him around. With the pole still in his hands, Alaniz assumed an aggressive stance. Nevertheless, Farr was able to lift him up and slam him to the asphalt on the street. Farr called for additional help as he tried to control Alaniz.

Alaniz rolled around and managed to get back on his feet, but Farr got him back on the asphalt. As Alaniz continued to roll from side to side, he grabbed Farr's hand and rolled on his stomach, trapping Farr's hand between the asphalt, Alaniz's face, and the weight of his body. Farr believed Alaniz was going to bite his hand, so he pulled his hand out and punched Alaniz three to four times on his face. Officer Chad Medeiros arrived shortly after that and assisted Farr in handcuffing Alaniz. As they walked him to a patrol car, Alaniz swung his arms and attempted to walk backwards against the direction they were taking him. During a search of Alaniz's property, the officers found a syringe and a glass tube with methamphetamine residue on the inside.

After the struggle with Alaniz, Farr felt a pain in his right hand and his hand was red and swollen and had a bump on it, which caused Farr to believe it was broken. Farr went to a hospital emergency room where his hand was X-rayed and medical personnel determined it was not broken. Farr was treated with ice and given over-the-counter pain medication because he did not want a prescription. For the first three months after injuring his hand, Farr experienced a substantial amount of pain in his hand that occurred even with the slightest bump and he had difficulty making a fist. This hindered his ability to do his job because his right hand was his "gun hand." In June 2017, when this matter was tried, Farr still had a bump on his right hand.[2]

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[2] Alaniz suffered a broken nose.

## DISCUSSION

***The section 654 Issue***

Alaniz contends the term imposed on his battery with injury on a police officer conviction in count 2 must be stayed pursuant to section 654 because his resistance comprised a single course of conduct and the court imposed a five-year term on his resisting an executive officer by force conviction in count 1.[3] Respondent concedes and we agree.

"Section 654, subdivision (a), provides in pertinent part, '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' Section 654 therefore ' "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible ... depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" [Citation.]' [Citations.] However, if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.]

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its

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[3] Alaniz contends that section 654 also required that the sentence imposed on his resisting arrest conviction be stayed. This contention is moot in light of our decision, *infra*, to reverse his conviction for that offense.

findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1142–1143.) When applicable, section 654 bars concurrent sentences. (*People v. Radil* (1977) 76 Cal.App.3d 702, 713.)

Alaniz committed the resisting an executive officer by force and battery with injury on a peace officer offenses during a continuous course of conduct and with the singular objective of avoiding arrest. Thus, we agree with the parties that section 654 required the court to impose a stayed term on Alaniz's battery with injury on a peace officer conviction.

Further, in light of our decision to stay the term imposed on that conviction, we will remand the matter for resentencing. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 88 ["It is perfectly proper … to remand for a complete resentencing after finding an error with respect to part of a sentence and just as proper for the trial judge to reimpose the same sentence in a different manner."].)

***The Sufficiency of Evidence Issue***

Alaniz cites *In re Michael P.* (1996) 50 Cal.App.4th 1525 (*Michael P.*) to contend that Farr's subjective report of soreness and a "bump" on his hand were insufficient to prove injury within the meaning of section 243, subdivision (c). He further contends the evidence did not show that a battery caused Farr's injury because Farr did not explain how the weight of Alaniz's head caused the injury and it was more likely that if an injury occurred, it was caused by Farr punching him. Thus, according to Alaniz, the evidence is insufficient to sustain his conviction for battery with injury on a peace officer. We disagree.

"In determining the sufficiency of evidence, we must review the whole record in the light most favorable to the judgment to see whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.] We presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Whether the evidence presented at trial is direct or circumstantial, … the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' "
(*People v. Lara* (1994) 30 Cal.App.4th 658, 665 (*Lara*).)

Battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) Section 243, subdivision (c)(2) proscribes battery on a peace officer causing injury. Injury is defined in section 243, subdivision (f)(5) as "any physical injury which requires professional medical treatment." In *People v. Longoria* (1995) 34 Cal.App.4th 12, 17, the court explained that "[w]hat the statute prescribes as a qualifying injury is an injury which '*requires* professional medical treatment.' It is the nature, extent, and seriousness of the injury—not the inclination or disinclination of the victim to seek medical treatment—which is determinative. A peace officer who obtains "medical treatment" when none is required, has *not* sustained an 'injury' within the meaning of section 243, subdivision (c). And a peace officer who does *not* obtain 'medical treatment' when such treatment is required, *has* sustained an "injury" within the meaning of section 243, subdivision (c). The test is objective and factual."

In *Lara*, *supra*, 30 Cal.App.4th 658, during an altercation with the defendant, a police officer bruised both knees and received numerous cuts and abrasions on his hands. (*Id*. at p. 667.) The officer subsequently went to an emergency room and professional personnel cleaned his wound, gave him supplies for scrubbing himself later, checked his knees for ligament damage and treated contusions on his knees. In finding the evidence

sufficient to sustain the defendant's battery on a police officer with injury conviction, the court rejected the defendant's argument that an injury under section 243, subdivision (c) "is not something that 'can be cured or alleviated with common household remedies, with self-help or by doing nothing' but must be 'sufficiently severe a physician would recommend or perform affirmative acts in intervention, such as minor surgery, suturing, skin grafts, administration of prescription medicines or the like.' " (*Lara*, *supra*, 30 Cal.App.4th at p. 667; accord, *People v. Longoria*, *supra*, 34 Cal.App.4th at p. 18.)

Here, Alaniz took Farr's right hand, placed it between his face and the asphalt and then placed his body weight on the hand before Farr removed it. Farr testified that afterwards his hand hurt, it was red and swollen, and he had a bump on it that was still present in June 2017 when he testified. Although X-rays at the hospital determined that Farr's hand was not broken, he was treated with ice and over-the-counter pain medication. Three months after arresting Alaniz, Farr still experienced a substantial amount of pain in the hand that made it difficult for him to make a fist and hindered his ability to hold a firearm. Thus, the evidence supports a finding that Farr sustained an injury within the meaning of section 243, subdivision (c).

In *Michael P.*, *supra*, 50 Cal.App.4th 1525, while being transported by an officer to court in a van, a handcuffed juvenile managed to take his seat belt off and kick the officer and the steering wheel several times, striking the officer on the chest and chin. The officer, however, was able to stop the van and gain control of the juvenile. Afterwards, the officer was sore on his chest and chin, but he did not report any injuries or see a nurse or doctor, no one wrote up a medical report of his injuries or took photographs and he was not bruised. (*Id*. at pp. 1527-1528.) The juvenile court sustained a charge of battery with injury on a peace officer. (*Id*. at p. 1527.)

In reversing, the appellate court stated, "In the absence of some further detail about [the officer's] soreness, we feel compelled to find the evidence of injury is

insufficient to support the juvenile court's finding of a battery with injury on a peace officer in violation of … section 243, subdivision (c)." (*Michael P.*, *supra*, 50 Cal.App.4th at p. 1530.)

*Michael P.* is inapposite because the jury could reasonably find that the battery by Alaniz caused a serious injury to Farr's hand that required professional medical treatment and that its symptoms lasted at least three months and affected his ability to perform his duties as a police officer. Further, even if punching Alaniz could have caused Farr's injuries, it was up to the jury to resolve any conflict in the evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) Thus, we conclude that the evidence was sufficient to sustain Alaniz's conviction for battery with injury on a peace officer.

***The Resisting Arrest Conviction***

Alaniz contends he could not be convicted of resisting arrest because it is a lesser included offense of battery with injury on a peace officer. Respondent again concedes.[4]

" '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) "When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed." (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) Resisting arrest is a lesser included offense of battery on a peace officer. (*People v. Perkins* (1970) 9 Cal.App.3d 1048, 1051; *People v. Jones* (1981) 119 Cal.App.3d 749, 755.) Since Alaniz committed his battery with injury on a peace officer and resisting arrest offenses during a continuous course of conduct, the latter offense is a

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**4** Alaniz also contends that resisting arrest is a lesser included offense of resisting a police officer by force. It is not. (See *People v. Belmares* (2003) 106 Cal.App.4th 19, 24–26.) In any case, this contention is moot in light of our conclusion that it is a lesser included offense of battery with injury on a police officer.

lesser included offense of the former offense, requiring reversal of Alaniz's conviction for resisting arrest.

***The Credits Issue***

The court awarded Alaniz 429 days of presentence custody credit consisting of 215 days of actual custody credit and 214 days of conduct credit. The abstract of judgment, however, states, "No time credits received [for any of the terms imposed on Alaniz's felony convictions] as they were applied to the misdemeanor cases, for which he is timed out." (Original all in capital letters.)

Alaniz contends his abstract of judgment erroneously indicates that the trial court did not award him any presentence custody credit. He also contends, in effect, that the court's award of presentence custody credit is ambiguous with respect to his two misdemeanor convictions. Thus, according to Alaniz, the matter must be remanded to the trial court so that it may issue an amended abstract of judgment that accurately reflects his award of presentence custody credits. Respondent agrees the matter should be remanded to the trial court for it to clarify its award of presentence custody credit.

Section 2900.5, subdivision (b) allows presentence credit to be given "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." Moreover, "[i]t is a basic rule that where an accused person is held in custody on a number of charges and upon conviction he is ordered to serve concurrent sentences, the time to be credited pursuant to section 2900.5 must be credited to each of them." (*People v. Schuler* (1977) 76 Cal.App.3d 324, 330.)

All of Alaniz's presentence custody was attributable to the charges of which he was convicted. Further, since we are reversing Alaniz's conviction on his resisting arrest conviction and staying the punishment imposed on his conviction for battery with injury on a peace officer, he is entitled to presentence custody credit only against the terms imposed on his resisting an executive officer by force conviction and/or his possession of

paraphernalia conviction. However, because the court imposed sentences on these convictions that ran concurrent to each other, he was entitled to presentence custody credit against the term imposed on each of these convictions. Thus, Alaniz's abstract of judgment should have shown that he is entitled to 429 days of presentence custody credit, as calculated above, against the term imposed on his resisting an executive officer by force conviction in count 1.

## DISPOSITION

Alaniz's conviction for resisting arrest is reversed and the 16-month term the court imposed on his conviction in count 2 for battery with injury on a peace officer is stayed. The sentence is vacated and the matter is remanded to the trial court for resentencing and for the court to recalculate all the days Alaniz served in custody through the date of resentencing. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29.) The court shall also issue an amended abstract of judgment that memorializes all the actual days in custody Alaniz has served through the date of his resentencing and his 214 days of presentence conduct credit and it shall forward a certified copy of the abstract to the appropriate authorities. In all other respects, the judgment is affirmed.